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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN D. HERBERT,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN D. HERBERT
Box 124
Chandler Heights,
Arizona 85227
(602) 988-2061
In Propria Persona

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QUESTION PRESENTED

1. Should the rationale eliminating the mens rea requirement set forth in United States v. Freed, 401 U.S. 601 (1971) be applied to constructive or joint possession cases in prosecutions arising under 26 U.S.C. Section 5861?

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LIST OF PARTIES

Parties involved in the proceedings in the Ninth Circuit were petitioner, John D. Herbert, co-defendant, Joseph A. Herbert, and the United States of America.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, issued on February 7, 1983, is reported at 698 F.2d 981 (9th Cir.1983), and set forth in the Appendix hereto.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered the judgment sought to be reviewed on February 7, 1983. Petition for rehearing was filed on February 15, 1983. The Order denying the Petition for Rehearing was filed April 27, 1983.

Section 1254(1) of Title 28 of

the United States Code confer jurisdiction upon the United States Supreme Court to review the final judgment of the Ninth Circuit in this criminal case by Writ of Certiorari. Pursuant to Rules 20.1 and 20.4 of the United States Supreme Court, the time for filing the Petition for Writ of Certiorari began to run on May 10, 1983 and expires on Friday, July 8, 1983.

STATUTES INVOLVED

26 U.S.C. Section 5861

§5861. Prohibited acts

It shall be unlawful for any person-

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter;

* * *

STATEMENT OF THE CASE

Following a jury trial, the United States District Court for the District of Arizona entered judgment of conviction against petitioner on one count of conspiracy to violate firearms laws in violation of 18 U.S.C. 371, and five counts each of possession of firearms not registered to him contrary to 26 U.S.C. §5861(d), transfer of an unregistered firearm contrary to 26 U.S.C. §5861(e), and making of an unregistered firearm contrary to 26 U.S.C. §5861(f) on November 23, 1981. Judgment against Joseph A. Herbert was entered the same date on three counts each of 26 U.S.C. §5861(d)(e)(f). All convictions were challenged on appeal. The convictions of Joseph A. Herbert were reversed (App. at A22), but those of petitioner were upheld. He now seeks a Writ of Certiorari to review that

portion of the judgment of the Court of Appeals which affirmed the judgment as to his convictions.

A. FACTUAL BACKGROUND

Petitioner was an attorney in Chandler, Arizona prior to 1979. One of his clients was Robert S. Jacob. Unknown to petitioner, Jacob was a government agent. According to Jacob, petitioner and John F. Davis offered to sell him machine guns in October 1979 (Trial Transcript, Volume II, page 179 [hereinafter cited as TR.Vol. p.] Petitioner testified that Jacob instigated the purchase in the spring of 1979, and continuously thereafter. (TR. Vol. III, p. 338).

Petitioner delivered one machine gun to Jacob on July 26, 1980, and was present when four others were delivered in August of 1980. John F. Davis (at

his sentencing) admitted that he bought each of these weapons, converted them to automatic and sold them to Jacob. This statement was supported by the testimony of petitioner and Jacob, both of whom testified that the guns were being transferred by Davis to Jacob.

Government witnesses were unequivocal in their testimony that there was no visible external tampering with the weapons, and that it was impossible to tell from the outside that the weapons were not legal semi-automatics. (TR. Vol. II, p. 12; TR. Vol II, p. 118)

No evidence was presented at trial to dispute any allegation that Davis bought and transferred the weapons to Jacob. Petitioner denied any ownership interest in or intent to control any of the weapons.

B. HISTORY OF THE PROSECUTION

This case originated with a seventeen count indictment against petitioner, his brother, Joseph A. Herbert, and John F. Davis, returned by a federal Grand Jury in Phoenix, Arizona on April 8, 1981. All three were charged with one count of conspiracy, five counts each of joint violation of aiding and abetting violation of 26 U.S.C. 5861(d)(e) and (f), and one count of falsification of a federal firearms form. Davis pled to one count of transfer of an unregistered firearm prior to trial, and was sentenced to four years probation. Petitioner and his brother went to a jury trial on their pleas of not guilty. At trial the count of falsification of firearms records was dropped at the government's request. The court

dismissed three counts regarding one weapon against Joseph A. Herbert at the conclusion of trial. The jury returned not guilty verdicts against Joseph A. Herbert on three counts involving a second weapon, and guilty verdicts against him on ten counts involving three weapons and the conspiracy count, and guilty verdicts against petitioner on all sixteen counts involving five weapons and conspiracy.

At trial the court gave the government's requested instructions on joint and constructive possession (App. A25) and Scienter (App. A24) over objection.

Petitioner's defense was entrapment and non-ownership of the weapons. He admitted constructive knowledge that the weapons were automatic, but denied that he was ever a transferee from

Davis, and therefore no registration could have been made in his name as transferee, and he never made, possessed or transferred the weapons which should have been registered by Davis in Jacob's name. He denied any intent to aid or abet any required registration.

Both defendants appealed their conviction to the United States Court of Appeals for the Ninth Circuit. Argument was presented to a three judge panel on October 14, 1982. The panel reversed Joseph A. Herbert's conviction, citing error in the scienter instruction regarding knowledge of the automatic character of the weapon, but held such instruction harmless error as to petitioner.

REASONS FOR ALLOWING THE WRIT

This Court eliminated the specific intent or mens rea requirement in certain prosecutions under 26 U.S.C.§5861 in United States v. Freed, 401 U.S. 601 (1971). That case involved defendants who were buying hand grenades for themselves. After lengthy discussion of the history and purpose of the scienter requirement the court noted:

> "This is a regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."
> (401 U.S. at 609)
> footnote omitted.

Hand grenades by their very nature appear to be weapons covered by the act, which the cases following Freed relied on in upholding convictions without proof of mens rea. United States v. Thomas, 531 F.2d 419 (9th Cir. 1976)

(short barrel rifle); United States v. DeBartolo, 482 F.2d 313 (1973) (short barrel shotgun).

The participants in these cases were all actively engaged in a permanent transfer of the weapons involved. The cases arising under Freed have not determined whether constructive or joint possession is sufficient to trigger an awareness in defendant that registration to him is required, absent scienter. The statute on its face dictates otherwise. There can only be one transferor and one transferee for any weapon regulated by the statute. 26 U.S.C. Section 5812. A reading of this section makes it clear that the transferor is required to fill out the application, and the named transferee is the actual custodian of the weapon. Without changing ownership, there is no way a lawfully registered weapon can be "possessed" by another

party. The doctrine of joint or constructive possession applied under this interpretation would lead to anomalous results in clear violation of due process if some mens rea requirement is not mandated. Any family member of a registered owner would violate 26 U.S.C. Section 5861 (d) and (e) by picking up and looking at the weapon, and handing it back to anyone else. No one would ever be able to look at, touch, or hold a firearm defined under 26 U.S.C. Section 5845, whether registered or not, whether obvious from its appearance lawful or not, without coming under the sanctions of the statute. These anomalies arising from the requested scienter instruction clearly disturbed the trial court, as witness the following:

> "THE COURT: According to what you say, it is not rebuttable at all. Is that right?

MR. FIELDS: It's not rebuttable. It is not a presumption.

THE COURT: According to this, if I have got it in my hand --

MR. FIELDS: And you know it's a machine gun.

THE COURT: No. That's not what you said. I don't know that it's illegal.

MR. FIELDS: You don't have to know this.

THE COURT: That's what I said. Somebody hands it to me and says: Look at this, and I say: Hey, that's a wierd (sic) weapon. When I have got it in my hands according to what you say, you're guilty of a crime.

MR. FIELDS: No, I cannot prove knowing possession of a machine gun. I can prove that you possessed a firearm. I cannot prove that you possessed a machine gun type firearm.

THE COURT: It says that it is necessary for you to prove that the weapon was a firearm within the meaning of the statute. The machine gun, that says that it is necessary for the Government

> to prove that the defendant knew that the weapon was a machine gun prohibited by the statute. Is that what you're saying?
>
> MR. FIELDS: Right.
>
> THE COURT: If somebody handed that to me, according to your theory if someone put it in my hands and said: Take a look at this weapon, and he tells me: It's a machine gun, I'm guilty of possession?"
>
> (TR. Vol III, pages 415, 416)

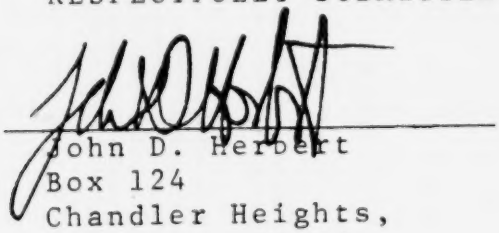
Pursuant to Rule 17(.1)(c), this Court should issue the Writ to decide an important question of federal law which has not been but should be, settled by the Court, and to avoid future conflicts of decision on this point of federal law between the circuits.

CONCLUSION

An extension of the *Freed* doctrine eliminating *mens rea* requirements in constructive or joint possession prosecutions would lend to arbitrary and capricious enforcement of a law too vague to give fair warning to those who might come under its onus. The Writ should be granted to preserve the fairness of the judicial process.

DATED: June 1, 1983

RESPECTFULLY SUBMITTED.



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A P P E N D I C E S

CAPTION

Filing Stamp:
February 7, 1983

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
VALDEMAR A. CORDOVA, DISTRICT JUDGE, PRESIDING

Argued and submitted October 14, 1982

Before: SKOPIL and FLETCHER, Circuit Judges; and SCHWARTZ,* District Judge

SKOPIL, Circuit Judge;

John David Herbert and Joseph Anthony Herbert appeal their convictions of conspiracy to violate the firearm laws contrary to 18 U.S.C. §371, and of possession, making and transferring of

---

* The Honorable Edward J. Swartz, Senior United States District Judge for the Southern District of California, sitting by designation.

unregistered machine guns in violation of 26 U.S.C. §5861(d), (e) and (f). We affirm as to John Herbert and reverse as to Joseph Herbert.

I.

Appellant John Herbert, an attorney, and John Davis, a gun dealer, delivered five automatic weapons to Robert Jacob, an ATF informant. These weapons had originally been manufactured as semi-automatics, and had been internally converted to be automatic. The automatic character of the weapons was not obvious; the weapons externally appeared to be legal semi-automatics. Several different transactions took place between John Herbert and Jacob, one of which was videotaped. At the videotaped transaction, John Herbert and Davis were present, as well as John's younger brother, appellant, Joe Herbert. Joe Herbert had

driven Davis to pick up the weapons, had waited at Davis' house while Davis worked on the guns in another room, and carried the guns into Jacob's house. During the meeting at Jacob's house, both appellants were present while the nature of the weapons was discussed. In particular, John Herbert discussed what to do if apprehended with the automatic weapons by police. Joe Herbert hardly spoke during the videotaped transaction, and left early.

John Herbert and Joseph Herbert were indicted on a 17-count indictment alleging conspiracy to violate the firearm laws contrary to 18 U.S.C. §371; five counts each of making and aiding and abetting the making, possession and transfer of unregistered firearms in violation of 26 U.S.C. §§5861 (d), (e) and (f); and one count of falsification of a federal firearms form in violation of

18 U.S.C. §922(m).[1]

At trial the government dismissed the count of falsification of a federal firearms form. The trial court granted Joseph Herbert's motion for judgment of acquittal on three counts regarding one of the transferred weapons. The jury found Joseph Herbert not guilty with respect to three counts regarding one automatic weapon, but returned a verdict of guilty on the remaining nine counts regarding three automatic weapons which were transferred during the videotaped transaction. The jury found John Herbert guilty on all 16 counts remaining.

Joseph Herbert was sentenced to two years probation on each count, to run concurrently. John Herbert was sentenced to two years in prison on each count, to run concurrently.

---

[1]Davis had also been named on the indictment, but pleaded guilty prior to trial

II.

The issues on appeal are:

1. Whether the jury selection plan unconstitutionally excludes Native Americans, and whether the motion to transfer to a different division was properly denied;

2. Whether a comment by the trial court denied John Herbert a fair trial;

3. Whether the trial court's instructions on aiding and abetting and on conspiracy violated the double jeopardy clause;

4. Whether the trial court abused its discretion in denying the motion for a new trial on the basis of newly discovered evidence; and

5. Whether the trial court's instructions that scienter and the factual knowledge of the character of the weapon were not elements of 26 U.S.C. §5861 were correct statements of the

law.

III.

The test for determining whether a jury selection process meets the requirements of the fifth and sixth amendment is:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which jury are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979), quoted in United States v. Berry, 627 F.2d 193, 196 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981)

The test for a constitutionally selected jury is the same, whether challenged under the fifth and sixth amendments of the Constitution or under the Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq. United States v. Brady, 579 F.2d 1121, 1133 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979); Foster v. Sparks, 506 F.2d 805, 816-17 (5th Cir. 1975); United States v. Test, 550 F.2d 577, 584 (10th Cir. 1976); United States v. Smith, 463 F.Supp. 680, 681-82 (E.D. Wis. 1979).

The Jury Selection and Service Act specifically provides for splitting a district into divisions and using only one division's jury wheel for petit juries:

> [A]ll litigants in Federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

Appellant also argues that his motion for transfer to the Prescott Division should have been granted. The denial of a motion for transfer should be overruled only if the district court abused its discretion. United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979) (motion for change of venue). Fed.R. Crim.P. 18 provides that "[t]he [district] court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." This was meant to "vest[] discretion in the court to fix the place of trial at any place within the district." Fed.R.Crim.P. 18, Advisory Comm. Notes, 1966 Amendment. In this case almost all of the witnesses, the defendants and attorneys lived in the Phoenix area, and the incidents

alleged in the indictment occurred within the Phoenix Division. Thus, the district court cannot be said to have abused its discretion in denying the motion for transfer to the Prescott Division.

IV

In determining whether a defendant was denied a fair trial by a comment of the court, defendant must show prejudice stemming from the comment. United States v. Price, 623 F.2d 587, 593 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); United States v. Panza, 612 F.2d 432, 440 (9th Cir. 1979), cert. denied, 447 U.S. 925 (1980).

While defense counsel was examining appellant John Herbert, an attorney, about his knowledge of the Gun Control Act, defense counsel asked appellant "how complicates would you say that Act is?" The prosecutor objected, on the

grounds that a legal opinion was asked for. The court responded:

> Yes, sustained. You're not implying it's too complicated for a lawyer, are you?

Appellant argues that this comment was a direct inference regarding appellant's veracity and his intent to violate the law, and therefore denied him a fair trial.

Defense counsel had been attempting to show that appellant John Herbert, because of the complexity of the Gun Control Act, did not understand what weapons were in violation of the Act. The court's comment was obviously a jocular aside. Further, the court later instructed the jury that it was not to draw any inference from the court's actions in the case. Though the court's unfortunate comment could be construed to mean that because appellant was a

lawyer he should have understood the Act, this slight remark by the court could have had only minimal impact on the jury's decision, and thus could not be said to have prejudiced the defendant's opportunity for a fair trial.

V

"The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." United States v. Dinitz, 424 U.S. 600, 606 (1976) (emphasis added) (footnote omitted); see United States v. Wilson, 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). See also Whitebread, Criminal Procedure 483 (1980).

Appellants claim that the multiple punishments for the conspiracy convictions and the aiding and abetting convictions

violated their double jeopardy rights. The offense of conspiracy is separate from an offense of aiding and abetting. While the typical case of aiding and abetting under 18 U.S.C. §2 involves a "knowing concert of action pursuant to agreement," it is not the only way to aid and abet. United States v. Valencia, 492 F.2d 1071, 1073 (9th Cir. 1974). Conspiracy requires a prior agreement to commit an offense. Aiding and abetting does not require a prior agreement, but only that the defendant consciously share in a criminal act, regardless of the existence of any agreement. Pereira v. United States, 347 U.S. 1, 11-12 (1954). Thus, sentencing for both conspiracy and aiding and abetting would not violate double jeopardy.

VI

A new trial may be granted if

required in the interests of justice. Fed.R.Crim.P. 33. For a motion for a new trial to be granted on the basis of newly discovered evidence, the evidence must be, inter alia, such as, on a new trial, would probably produce an acquittal, and not be merely cumulative or impeaching. United States v. Kenny, 645 F.2d 1323, 1343 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Brashier, 548 F.2d 1315, 1327 (9th Cir. 1976). "The decision to grant or deny a motion for a new trial based on newly discovered evidence falls within the sound discretion of the trial judge." United States v. Kenny, 645 F.2d at 1343; United States v. Krasny, 607 F.2d 840, 845 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980).

In support of their motion for a new trial, appellants submitted the affidavit of a witness, unknown at the

time of trial, who stated that Jacob (the government informer) had several years earlier personally solicited him to acquire automatic weapons for him, and instructed on how to convert semi-automatic weapons into automatic weapons. This evidence, however, goes only to impeachment of the government's main witness, and is not such that "on a new trial would probably produce an acquittal." Therefore the district court did not abuse its discretion in denying the motion for new trial on the basis of this newly discovered evidence.

VII

The district court instructed that the essential elements of the crime of illegal possession [or transfer] of an unregistered weapon are (1) knowing possession [or transfer] of a machine gun and (2) that such machine gun was unregistered. The trial court

then instructed (to which appellants objected) that:

> The mere possession, transfer or making of a firearm which is required to be registered and has not been is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon was a firearm within the meaning of the statute or that he knew that registration was required. It is sufficient if you find beyond reasonable doubt that he knowingly possessed, transferred and/or made it.

Appellants argue that this instruction is erroneous, in that a person can be convicted without any knowledge of the true nature of the weapon, i.e., without knowledge that a perfectly legal weapon had been converted to be automatic. We will reverse in this case only if there is error and if there is a reasonable possibility that error

materially affected the verdict. United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977).

To be guilty of possession and transfer of an unregistered firearm pursuant to 26 U.S.C. §§ 5861 (d) and (e), there is no requirement that the defendant be shown to have a specific intent to commit the crime. United States v. Thomas, 531, F.2d 419, 421 (9th Cir.), cert. denied, 425 U.S. 996 (1976). The government does not need to prove that the defendant knew the possession or transfer was against the law, or that the weapons in question were required to be registered. United States v. Freed, 401 U.S. 601, 607 (1971). The defendant also does not need to know all the characteristics of the weapon which subjects it to regulation. "It is enough to prove he knows that he is dealing with a dangerous device of such

type as would alert one to the likelihood of regulation." United States v. DeBartolo, 482 F.2d 312, 316 (1st Cir. 1973), quoted in Thomas, 531 F.2d at 421-22.

The cases in this circuit that have approved this kind of instruction have dealt with weapons that by their very nature would have alerted the defendant that they "approached the area of regulation." See United States v. Freed, 401 U.S. 601 (hand grenades); Thomas, 531 F.2d 419 (short barrel rifle); De Bartolo, 482 F.2d 312 (sawed-off shotgun); Sipes v. United States, 321 F.2d 174 (8th Cir.), cert. denied, 375 U.S. 913 (1963) (short barrel rifle, externally modified).

The Supreme Court, in discussing the scienter requirement in a similar statutory scheme, stated that

> Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . "mens rea" as to each ingredient of the offense.

United States v. International Minerals & Chemical Corp., 402 U.S. 558, 564-65 (1971), quoted in Thomas, 531 F.2d at 421.

In this case, the firearms involved were weapons that had been only internally modified, and from the exterior looked like perfectly legal semi-automatic pistols. No markings had been interfered with and no external modifications had been made. Legal firearms are quite prevalent in today's society. While a sawed-off shotgun or a short barrel rifle, De Bartola, 482 F.2d at 416; Thomas, 531 F.2d at 421-22, may be a dangerous device of such type as would alert one to the likelihood of regulation, we do not find that an ordinary firearm that is internally

and undetectably modified to be automatic yet legal in appearance and markings falls within this category. If the law was as stated in this instruction, then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law. We are sure Congress did not intend that this statute be so draconian. Accordingly, we hold that, in a situation in which there were no external indications on the weapon that would "alert one to the likelihood of regulation," the district court's instruction was erroneous.

With respect to John Herbert, however, the error is harmless and reversal is not required. John Herbert's defenses were that he never possessed the weapons and that he was entrapped.

There was overwhelming evidence that John Herbert knew that the weapons were automatic. In light of this overwhelming evidence, there is no "reasonable possibility that the error materially affected the verdict." Valle-Valdez, 554 F.2d at 915.

With respect to Joseph Herbert, however, in light of the lack of evidence regarding his knowledge of the actual nature of the weapons, the error in the instruction was not harmless. While the evidence was undisputed that Joe Herbert drove Davis and the firearms to Jacob's house, the only evidence that could show that Joe knew of the illegal character of the weapons was in the videotape of the meeting in Jacob's house. The videotape shows only that Joe was present while the men discussed the automatic nature of the weapons and possible

defenses to tell law enforcement officials if caught, and that Joe did not actively participate in these discussions. Mere presence while a crime is being committed is insufficient to infer criminal knowledge or intent. United States v. Sutherland, 463 F.2d 641, 648 (5th Cir.), cert. denied, 409 U.S. 1078 (1972). In light of the paucity of evidence that Joe Herbert knew the factual character of the weapons, the error in the instruction cannot be held harmless. Accordingly, we reverse the convictions of Joseph Herbert.

CONCLUSION

The convictions of John Herbert are AFFIRMED. The convictions of Joseph Herbert are REVERSED.

	*
	* Filing Stamp:
	*
	* April 27, 1983
	*
CAPTION	*Denial of Petition for
	* Rehearing
	*

****

Appeal from the United States
District Court for the District
of Arizona
Valdemar A. Cordova, District
Judge, Presiding

Before: SKOPIL and FLETCHER, Circuit Judges, and SCHWARTZ, District Judge*

The panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

---

*The Honorable Edward J. Schwartz, Senior United States District Judge for the Southern District of California, sitting by designation.

GOVERNMENT'S REQUESTED INSTRUCTION
No. 36

SCIENTER NOT REQUIRED

The mere possession, transfer or making of a firearm which is required to be registered and has not been is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon was a firearm within the meaning of the statute or that he knew that registration was required. It is sufficient if you find beyond reasonable doubt that he knowingly possessed, transferred and/or made it.

3 Devitt & Blackmar, Fed. Jury Instr. §59.04

GOVERNMENT'S REQUESTED INSTRUCTION NO. 44 as Amended

The elements of illegal possession are as follows -- there are two:

First, that the defendant at or about the time and place charged in the Indictment knowingly possessed a machine gun, and

Second, that the machine gun was not then registered to the defendant in the National Firearms Registration and Transfer Record.

Members of the jury, under the law, the law recognized two kinds of possession: Actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession, knowingly has both

the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes that also possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) SS.
County of Maricopa)

JOHN D. HERBERT, swears:

Pursuant to Rules 28.3 and 28.5(c) of the United States Supreme Court, I served copies of the foregoing Petition for Certiorari on the below named parties in the following manner:

By express mailing the original and 40 copies to:

CLERK, UNITED STATES SUPREME COURT
Washington, D.C. 20543

By express mailing three (3) copies to:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

By depositing in the United States Post Office, first-class, postage pre-paid to:

JAMES H. KEMPER, Esq.
45 W. Jefferson, 11th Floor
Phoenix, Arizona 85003
Attorney for Joseph A. Herbert

3 copies addressed to:

SUSAN A. EHRLICH
ASSISTANT UNITED STATES ATTORNEY
4000 U.S. Courthouse
Phoenix, Arizona 85025
Local counsel for the United
States of America

John D. Herbert

SUBSCRIBED AND SWORN TO before me this 1st day of June, 1983.

Notary Public

My Commission Expires:

August 10, 1986